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March 30, 2011

Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: In the Matter of Implementation of Section 224 of the Act, WC Docket No. 07-245; A National Broadband Plan for our Future, GN Docket No. 09-51

On behalf of Ameren Services Company, CenterPoint Energy Houston Electric, LLC, and Virginia Electric and Power Company, together, The Pole Owners Working for Equitable Regulation ("POWER") Coalition, we submit this response to several recent *ex parte* filings made in the referenced proceedings.

I. Eligibility of DAS Providers as Telecommunications Carriers

DAS providers, through the DAS Forum, have been active in this month of March, 2011. *See, e.g., ex parte* filings made by the DAS Forum on March 2, March 10, March 15 and March 18. The DAS Forum describes itself as a "membership section" of PCIA – the Wireless Infrastructure Association.

The PCIA website explains[1] that the wireless infrastructure industry came into being as telecommunications carriers who formerly built and managed their own antenna support infrastructure then offloaded their portfolios of infrastructure to tower owners and managers. According to materials included with some of the referenced *ex parte* presentations, a distributed antenna system – DAS – is a network of antenna nodes that can be mounted on utility poles. However, just as the owner of a tower upon which a cellular antenna array is mounted is not necessarily a cellular carrier, the owner of a DAS is not necessarily a wireless telecommunications carrier.

[1] http://www.pcia.com/index.php?option=com_content&view=article&id=10&Itemid=29, last visited March 28, 2011.

The DAS Forum materials that were provided in their *ex parte* meetings with FCC staff address the "Statutory Rights" of DAS providers. These materials point to the Supreme Court's decision in *National Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002), as authority for the proposition that "wireless attachers are entitled to the benefits and protections of Section 224 for the attachment to utility poles of antennas and associated equipment."

The term "wireless attachers" may be a convenient reference term, but its use obscures the fact that the Supreme Court was talking about "...some attachments by wireless telecommunications providers – those, presumably, which are composed of distinctively wireless equipment..." and whether such equipment was covered under Section 224 of the Communications Act. The Court ruled that such attachments are not excluded from coverage, but it did not rule that *any* company that wants to put wireless equipment on a pole has a right to do so. The Court was speaking only about attachments by wireless telecommunications providers.

Based on the provisions of Section 224 and the holding of the Supreme Court, we dispute the right of a non-telecommunications carrier to place equipment on a utility pole and to pay a regulated rental rate for doing so, based simply on the fact that the equipment is wireless equipment. Moreover, we know of no case that holds that DAS providers somehow derive eligibility for mandatory access and regulated rental rates from the nature of their customers as telecommunications carriers. Unless a particular DAS provider is certificated by the cognizant state public utility commission as a telecommunications carrier, we challenge the right of that DAS provider to mandatory access and regulated rental rates under Section 224.

II. Disparity in Pole Space Charges as Between ILECs and Electric Utilities

The *ex parte* filing of CenturyLink, on March 17, 2011, which argues for regulated rental rates for pole attachments by ILECs, contends that, under typical joint use agreements, electric utilities compel ILECs to pay for three feet of space in the communications space, even though the ILEC may use only one foot of that space for its facilities. Furthermore, CenturyLink contends that the electric utility makes the unused space available for pole attachments by cable companies and telecommunications carriers, thereby collecting rent for space that has already been paid for by ILECs. *See* slides 9 and 10 of CenturyLink's *ex parte* presentation.

Although CenturyLink attributed this circumstance to a lack of negotiating leverage on the part of ILECs, the real culprit in this instance is the Federal Communications Commission ("FCC" or "Commission"). In the *Local Competition Order*, 11 FCC Rcd 15499, released August 8, 1996, Order on Reconsideration, 14 FCC Rcd 18049, released October 26, 1999, the Commission considered the question whether vacant pole space could be "reserved" by an electric utility for its own later use. The Commission said, "...allowing space to go unused when a cable operator or telecommunications carrier could make use of it is directly contrary to the goals of Congress." *See Local Competition Order*, ¶ 1168.

Accordingly, the Commission ruled that an electric utility could only reserve space for its own use only pursuant to "...a *bona fide* development plan that reasonably and specifically projects a need for that space in the provision of its core utility services." Even then, the utility must permit use of reserved space by cable operators and telecommunications carriers until such time as the utility has an actual need for that space. *See id.*, ¶ 1169.

Ever since that ruling, electric utilities have allowed the use by cable companies and telecommunications carriers of any available space in the communications space on the pole. This interpretation is further reinforced by the fact that the Commission had been quite clear in restricting the reservation of space only for purposes relating to the electric utility's core utility services. The Commission forbade electric utilities from reserving space which it intended to use for the provision of its own competitive telecommunications services. *See id.*, ¶ 1169. Clearly, then, electric utilities certainly could not prevent the use of space that might someday be used by an ILEC for services that, by definition, would compete with telecommunications carriers and cable companies.

The picture painted by CenturyLink, of electric utilities' using some kind of perceived leverage in order to recover multiple payments of rent for the same space on the pole, is distorted. The Commission has created the circumstance complained-of by CenturyLink. Now the electric utilities are being beset by ILECs who are looking for any reason to modify longstanding relationships with their traditional pole-owning colleagues. The Commission should own up to the role it played in the condition that has evolved and fix it. The fix, however, is not to be found in any tortured interpretation of the Pole Attachments Act that turns a fellow pole-owning utility into merely another arms-length attaching entity.

III. Pole Top Locations for Wireless Antennas are Rivalrous

On March 17, CTIA submitted an *ex parte* presentation that included the observations of Dr. Charles Jackson concerning the efficiencies to be gained by locating wireless antennas at the tops of poles rather than in the communications space. See also the March 15 comments of ATC Outdoor DAS to the effect that antennas mounted at the top of the pole can cover a greater area with fewer antennas and can support a greater number of telecommunications carriers.

These comments highlight a significant flaw in the arguments of wireless companies who contend that they should pay the same rental rate as companies who place linear attachments in the communications space. Clearly the pole top position has greater value than a position in the communications space. Not all utilities allow wireless attachments to be placed at the top of the pole; but for those who do, they should be permitted to recover this value because, by definition, there is only one top of each pole. The space is thus *rivalrous*, within the meaning of *Alabama Power Company* v. *F.C.C.*, 311 F.3d 1357 (11th Cir. 2002), and subject to market rental rates.

The notion of cost-based rates dates from the time when all pole attachments were linear attachments. It mattered not, in terms of the operating characteristics of the attached wire, whether it was mounted in the lowest position in the communications space or the highest. Thus, uniformity of rental rates made sense.

In the case of wireless antennas, as shown by CTIA and ATC Outdoor DAS, it matters a great deal where the antenna is placed, in terms of the operating characteristics of the antenna. Without some ability to charge according to position on the pole, electric utilities that permit pole-top attachments will be caught in the middle when competing, that is, *rivalrous*, wireless carriers all seek to be the one at the top of the pole.

IV. Wireless Industry Acknowledgment of Possible Good Faith Delays in Make-Ready

On March 15, CTIA and the DAS Forum, in separate filings, stated that they would be willing to add the possibility of a 30-day extension to the make-ready work timeframes proposed by the Commission, if the pole owner could demonstrate a good-faith reason for such extension.

The POWER Coalition has stated in its comments that it could accept the Commission's proposed timeframes if it had the flexibility to extend those timeframes for legitimate reasons beyond the control of the pole owner. The willingness of CTIA and the DAS Forum to accept a limited ability to extend the timeframes shows that the wireless industry understands and acknowledges that hard and fast timeframes cannot always be met, despite the pole owner's best efforts. There inevitably will be instances when the timeframe must be extended for reasons beyond the control of a pole owner. An ordinary commercial contract would handle many such contingencies through a *force majeure* provision. Subjecting a pole owner to a complaint and possible monetary penalties is nothing more than an unjustified shifting of all risk to one of the two parties.

Communication between the parties is the key. The wireless industry fears that unless the timeframes are hard and fast, they will routinely be missed. This is nonsense. The timeframes will be met in most instances. Where they cannot be met, the attaching entity should be informed and given an opportunity to prioritize its requested work, consistent with whatever circumstance has developed to impede normal make-ready work schedules.

Respectfully submitted,

/s/
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